IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MAY 31, 2007 Session

IRA LYNN REAGAN, As Conservator of the property and person of HAZEL RAYBORN, an incapacitated person v. KINDRED HEALTHCARE OPERATING, INC., ET AL.

Direct Appeal from the Circuit Court for Putnam County
No. 04J0446 John Turnbull, Judge

No. M2006-02191-COA-R3-CV - Filed December 20, 2007

This appeal involves an arbitration agreement that was executed by a nursing home resident when she was admitted to the nursing home. The resident's estate has filed an action against the nursing home in circuit court and demanded a trial by jury on all issues. The defendants filed a motion to compel arbitration. The administrator of the resident's estate argued that (i) the arbitration agreement was incapable of performance for failure of an essential term; (ii) the nursing home breached fiduciary duties it owed to the resident by obtaining her signature on the agreement; (iii) the agreement was an unconscionable contract of adhesion; and (iv) the resident was unable to knowingly agree to arbitrate disputes, thereby waiving her right to a jury trial. The trial court dismissed the motion to compel arbitration without making any findings of fact or conclusions of law. The defendants appeal. For the following reasons, we reverse and remand for entry of an order compelling arbitration.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and DONALD P.HARRIS, SENIOR JUDGE., joined.

F. Laurens Brock, David J. Ward, Jacob Parker, Chattanooga, TN, for Appellants

Richard E. Circeo, Deborah Truby Riordan, Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

In October of 2003, Ms. Hazel Rayborn fell and broke her leg. She was admitted to Cookeville Regional Medical Center ("the hospital") for treatment, where she remained for four to five days. Her physician recommended that she enter a nursing home upon her release from the hospital in order to receive rehabilitation and treatment, and because she was catheterized. Ms. Rayborn had previously lived in a house with her son, Ira Lynn Reagan, and her daughter-in-law, Crystal Reagan. Mr. Reagan disagreed with Ms. Rayborn's decision to enter the nursing home, but Ms. Rayborn weighed her options and felt that it would be in her best interest.

Ms. Rayborn was admitted to Masters Health Care Center ("Masters") on October 14, 2003.[1] An ambulance transported her from the hospital to the Masters facility. Once Ms. Rayborn was settled into her room, Mr. and Mrs. Reagan came in to visit her, and two Masters employees came in to discuss Ms. Rayborn's admission and insurance. One of the employees was Melinda Bilbrey, the Admissions Coordinator at Masters, and the identity of the other employee is unknown. Ms. Bilbrey explained the rehabilitation treatment that Ms. Rayborn would receive and discussed Medicare and insurance issues. Ms. Bilbrey and Mr. Reagan then explained to Ms. Rayborn the purpose and meaning of several documents that needed to be signed.

According to Mr. Reagan, when it came time for Ms. Rayborn to actually sign those documents, Ms. Rayborn stated that it was difficult for her to see the signature line because of her limited vision, and she asked if it was okay for Mr. Reagan to sign it for her. Mr. Reagan claims that

[1] Masters is owned, operated, and managed by the various defendants.

Ms. Rayborn gave him this authorization to sign for her in the presence of Masters' employees. According to Mrs. Reagan, however, this conversation took place when they were still at the hospital discussing the nursing home with Ms. Rayborn's physician. Mrs. Reagan explained that Mr. Reagan asked his mother "if she wanted him to sign the papers or if she wanted to," and Ms. Rayborn instructed Mr. Reagan "to go ahead and sign them."

In any event, Mr. and Mrs. Reagan accompanied another unidentified employee to an office where Mr. Reagan signed some documents. According to Mr. Reagan, this took approximately three to five minutes. Mr. Reagan signed a "Resident Admission Agreement" and "Resident Admission Contract" on the lines designated for the resident's "Financial Agent." There were separate signature lines for the "Resident or Conservator or Legal Guardian," the "Power of Attorney," and the "Agent," which were left blank. A "Financial Agent" was defined on a separate sheet as "the individual or organization who personally assumes financial responsibility for any part of the Resident's share of costs or liability. The 'Financial Agent' is a third party guarantor of payment." Mr. Reagan also signed a "Record of Admission" authorizing the release of information to Medicare and requesting payment of Medicare and insurance benefits. In the area provided for signatures, this form stated: "The above resident is unable to sign this document for the following medical reason and I hereby sign on his/her behalf . . . ." No medical reason was listed, but Mr. Reagan signed on the line designated "authorized representative" and listed "son" beside his name. Mr. Reagan also signed an "Assignment of Benefits" form regarding insurance payments. This form stated, in part:

> **If resident is physically or mentally unable to transact business,** an individual may sign on behalf of the resident. (Note: the individual that may sign may be a representative payee, legal representative, relative, friend, representative of an institution providing the enrollee care or support, or a governmental agency providing him/her assistance) . . . .

Mr. Reagan signed below this paragraph on the signature line for the "Individual Signing on Behalf of Resident." Mr. Reagan later stated that he did not remember the language about the resident being physically or mentally unable to sign. Mr. Reagan stated that he had the opportunity to read these documents, but he did not read them "perfectly" and did not understand all of the information. He explained that these documents were the same ones that were explained in Ms. Rayborn's room, and he was simply told to sign "here, here, and here," so he did. Each of the documents was either directly related to Medicare and insurance or signed in the capacity of "Financial Agent." Mr. Reagan assumed that he was signing to admit Ms. Rayborn to Masters so that she could receive care. Mr. Reagan only remembered signing "an admission paper and two or three other papers that [were] stated to [him] as insurance forms or paperwork that [was] needed to assign for insurance claims." Mrs. Reagan also recalled the discussions being limited to insurance matters.

Mr. Reagan never told anyone at Masters that he was acting as his mother's legal representative, and he was not appointed as her conservator or given power of attorney to act on her behalf. He only had her verbal permission to sign documents on her behalf.

After signing these documents, Mr. and Mrs. Reagan returned to Ms. Rayborn's room for approximately forty-five minutes to an hour, then went home. When they returned the next day, Ms. Rayborn told them that after they had left, a Masters employee brought in some more admission paperwork during the afternoon that she needed to sign "to finish up her admission." Ms. Rayborn told her son that these were documents that he didn't sign, that she needed to sign. Mr. Reagan later explained that this did not upset him, but he was curious as to why more papers were signed later. Ms. Rayborn never told him what specific documents she signed. According to Mr. Reagan, he had not received a copy of any of the admissions paperwork, despite being told that copies would be provided.[2] Mr. Reagan claims that he asked for copies of the admissions paperwork several times, but it appears that the copies were not provided until just before Ms. Rayborn left Masters.[3]

Ms. Rayborn was discharged from Masters on January 13, 2004. On August 26, 2004, Mr. Reagan was appointed conservator of the property and person of Ms. Rayborn. On October 13, 2004, Mr. Reagan, acting as conservator of Ms. Rayborn, filed this lawsuit against Kindred Healthcare Operating, Inc.; Kindred Healthcare, Inc.; Ventas, Inc.; Kindred Nursing Centers, Limited Partnership d/b/a Masters Health Care Center; and Sylvia Burton, in her capacity as Administrator of Masters Health Care Center (collectively, "the defendants"). The complaint alleges that Ms. Rayborn suffered injuries while residing at Masters as the result of the acts or omissions of the defendants. The complaint asserts causes of action for negligence; gross negligence, wilful, wanton,

[2] Mr. Reagan had to sign one additional document when he returned the day after Ms. Rayborn was admitted, which was a "Confidential Application" listing his financial resources that were available to pay for Ms. Rayborn's care.

[3] At times, Mr. Reagan said that he never received any copies, but at one point in his deposition he stated that he did not receive copies until after the "situation" arose that led him to remove Ms. Rayborn from Masters' facility.

reckless, malicious and/or intentional conduct; medical malpractice; violations of the Tennessee Adult Protection Act, Tennessee Code Annotated sections 71-6-101, *et seq.*; and breach of contractual duties owed to a third-party beneficiary based upon the defendants' corporate integrity agreement. The complaint seeks an unspecified amount of compensatory and punitive damages, and it "demands a trial by jury on all issues herein set forth."

The defendants filed a "Motion to Dismiss or in the Alternative for Summary Judgment," contending that the claims are barred by an Alternative Dispute Resolution Agreement that Ms. Rayborn signed. The style of this motion was later amended to read: "Motion to Dismiss Plaintiffs' Complaint and/or to Compel Arbitration." The parties engaged in discovery limited to issues regarding the formation of the arbitration agreement. Ms. Rayborn passed away while the case was pending in the trial court. She was never deposed, and she never discussed signing the arbitration agreement with Mr. and Mrs. Reagan. The record before us includes the depositions of Mr. and Mrs. Reagan, Melinda Bilbrey, and Sue Gibbons (another Masters employee), along with various admissions documents and a physician's affidavit. There is an eight-page, stand-alone document entitled, "**ALTERNATIVE DISPUTE RESOLUTION AGREEMENT BETWEEN RESIDENT AND FACILITY**," signed by Ms. Rayborn on October 14, 2003, the day she was admitted to Masters. The ADR Agreement provides that any and all claims or controversies arising out of or in any way relating to Ms. Rayborn's stay at Masters shall be submitted to alternative dispute resolution. The first page of the agreement further states, in bold print, "**Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s).**" The Agreement

goes on to state that the Tennessee Uniform Arbitration Act, Tenn. Code Ann. § 29-5-301, *et seq.*, shall govern the arbitration, and it further sets forth various specific rules governing the ADR process. The Agreement provides that Masters will be responsible for the mediator's fees, arbitrator's fees, and other reasonable costs, excluding Ms. Rayborn's attorney's fees. The final page of the ADR Agreement contains a single paragraph entitled, "**RESIDENT'S UNDERSTANDING OF AGREEMENT**," which provides:

> The Resident understands that (A) he/she has the right to seek legal counsel concerning this Agreement, (B) the execution of this Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (C) this Arbitration Agreement may be revoked by written notice to the Facility from the Resident within thirty (30) days of signature. . . . The Resident, or his or her designated legal representative, also had the opportunity to consult with the Facility representative regarding such explanations or clarification.

Ms. Rayborn printed and signed her name at the bottom of the final page on the lines labeled for the "Resident/Legal Representative."

Ms. Sue Gibbons is the employee who admitted Ms. Rayborn to Masters and obtained Ms. Rayborn's signature on the admissions documents, including the ADR Agreement.[4] There are approximately sixty pages of admissions documents and brochures that are presented when a resident is admitted to Masters, and the presentation and explanation generally takes about two hours. When explaining the ADR Agreement, Ms. Gibbons stated that she generally tells a resident that if the resident or his or her family does not like the care or services at Masters, they can settle a dispute through mediation and arbitration instead of a jury trial. She explains that it is a voluntary agreement, the resident can go over it, and she will make copies of it for him or her. She also tells the resident that it can be revoked within thirty days. During her deposition, Ms. Gibbons was unable to answer some questions about the various technical rules governing the ADR process, but she stated that if a resident had questions that she could not answer, she would consult with Ms. Bilbrey. Ms. Gibbons stated that no one had ever asked her questions regarding the ADR Agreement, but she had encountered at least one resident who did not want to sign it, and she simply wrote "Refuse to Sign" on the Agreement. Ms. Gibbons said that once a resident is admitted, Masters employees make copies of all the admissions paperwork and give the copies to the resident, along with the ten to twelve brochures that have been explained.

Ms. Gibbons stated that she specifically remembered admitting Ms. Rayborn to Masters. Each of the forms that Mr. Reagan had signed, Ms. Rayborn signed as well. For instance, the forms

[4] Ms. Gibbons is a Social Service Assistant and Physical Therapy Aide at Masters. Ms. Melinda Bilbrey is the Admissions Coordinator at Masters, and she usually completes the admissions paperwork. However, when Ms. Bilbrey is unavailable for whatever reason, another social worker or Ms. Gibbons will admit residents. To prepare her for such situations, Ms. Bilbrey has explained the various admissions documents and pamphlets to Ms. Gibbons. At her deposition, Ms. Gibbons stated that she had worked in the social services department for five years, but she had only admitted two to three residents.

stating, "resident is unable to sign" beside Mr. Reagan's signature were nevertheless signed by Ms. Rayborn. However, other forms had not been presented to Mr. Reagan and contained only Ms. Rayborn's signature. Ms. Gibbons testified about the process of admitting Ms. Rayborn:

> Q. Can you describe her state of mind at that time?
>
> [By the defendants' attorney]: Object to the form.
>
> A. No.
>
> Q. Was she confused at all?
>
> A. I don't know.
>
> . . .
>
> Q. Had any paperwork been signed prior to her arrival?
>
> A. I don't know.
>
> Q. You don't know? Do you recall going through the entire admissions process with Ms. Rayborn, what you described to me earlier: the pamphlets, the admissions paperwork and the arbitration agreement?
>
> A. Yes.
>
> Q. You do. How long did that take?
>
> A. A couple of hours.
>
> . . .
>
> Q. Was she having any problems with confusion?
>
> [By the defendants' attorney]: Object to the form.

A. No.

Q. Did she ask you any questions?

A. No.

. . .

Q. Do you specifically recall Ms. Rayborn signing all of these documents?

A. Yes.

. . .

Q. What specifically did you tell Ms. Rayborn about the arbitration clause in particular, if you specifically recall?

A. I don't know.

Q. You don't recall?

A. Well, what I've already told you.

Q. Tell it to me one more time just so we have it down.

A. If you don't like your care or your family doesn't like your care here, we can settle this dispute through mediation and arbitration instead of a jury trial. I can give you a copy of this. Your family can look over it. It's voluntary to sign it, and you have 30 days to revoke it. That's it.

. . .

Q. How was Ms. Rayborn dressed at the time you presented the documents to her?

A. She was in bed in a gown.

Q. Okay. What, if anything, did she say about the arbitration clause itself?

A. Nothing.

. . .

Q. Did she seem to understand it?

A. I don't know.

Q. You don't know. Did she seem to understand the other paperwork?

A. I don't know.

Q. Did she have any questions about any of the process?

A. No.

. . .

Q. Did she say anything to you during the admissions process?

A. No.

. . .

Q. And I know I asked this over and over, but can you recall any reaction at all that she had, anything she said, anything she did during the time that you presented those documents to her?

A. She just signed it. No, no.

. . .

Q. Do you recall whether this resident was either physically or mentally able to transact business at the time she was admitted?

A. I don't know.

Ms. Gibbons later reiterated that she specifically remembered telling Ms. Rayborn that if she chose to sign the ADR Agreement, she would be waiving the right to a jury trial, and she remembered telling Ms. Rayborn that she could revoke the agreement within thirty days. Ms. Gibbons also recalled that no one was with Ms. Rayborn when she admitted her, and Ms. Rayborn did not tell Ms. Gibbons who her family members were.[5] Ms. Gibbons did not remember whether she personally made a copy of the ADR Agreement that Ms. Rayborn signed.

Ms. Rayborn had not been diagnosed with Alzheimer's Disease or any form of dementia, and she had never been diagnosed or adjudicated as mentally incompetent. She had completed the eighth grade and received some homeschooling. Mr. Reagan did not think that Ms. Rayborn had a high school diploma, but Ms. Rayborn could read. Prior to being admitted to the hospital for her broken leg, Ms. Rayborn and Mr. and Mrs. Reagan lived together so that they could care for one another.[6]

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[5] Ms. Gibbons said that she had never met Mr. Reagan, but Ms. Gibbons' signature appears on the line beside Mr. Reagan's signature as a "witness" on some of the documents. Ms. Gibbons stated that she did not know when his signature was placed on the documents. At Mr. Reagan's deposition, he stated that he did not know any of the employees' names besides Melinda Bilbrey. When asked if he recognized the name Sue Gibbons, he stated that she may have been the employee who first met them in the room with Melinda Bilbrey. He also said, though, that he never saw that lady again after that meeting, and he was introduced to a different employee in the office when he went to sign the documents. He did not remember Sue Gibbons' name being on the documents when he signed them.

[6] Mr. Reagan is legally disabled.

Ms. Rayborn had physical problems requiring her to walk with a cane or walker, but she was mentally capable of handling her own financial affairs. According to Mr. Reagan, Ms. Rayborn also had limited vision and was unable to wear glasses or contacts because of her diabetes. Mr. Reagan said he personally felt that Ms. Rayborn should not have been making important decisions for at least a year prior to her breaking her leg. However, he said that she did continue to sign agreements and contracts on her own. Mr. Reagan was aware that "things could be done" to allow him to make legal decisions for her, but he did not pursue those options because of his financial situation and his uncertainty.

When Ms. Rayborn broke her leg, she was prescribed a Duragesic Patch to be applied every three days for chronic pain management, and she was also prescribed a five to ten milligram dose of Oxycodone (the active ingredient in Percocet and Tylox) to be administered every four to six hours as needed for acute pain management. The hospital administered Tylox to Ms. Rayborn at 8:40 a.m. on the day of her admission to Masters, and Masters personnel administered another dose at 1:00 p.m. The defendants submitted the affidavit of Karl Miller, M.D., a professor at the University of Tennessee College of Medicine and Board Certified Diplomat of the American Board of Family Medicine, who had reviewed Ms. Rayborn's medical records from the hospital and from Masters. According to Dr. Miller, the records reflected that Ms. Rayborn was alert and oriented, and "no physician or nurse documented a change in her cognition." Dr. Miller opined, to a reasonable degree of medical certainty, that a five to ten milligram dose of Oxycodone, administered every four to six hours, "does not impair an individual's cognitive ability to the point of preventing them from reading or understanding documents." Dr. Miller further opined, to a reasonable degree of medical

certainty, that "Hazel Rayborn was not cognitively impaired on October 14, 2003, to prevent her knowing and voluntary execution of the Alternative Dispute Resolution Agreement Between Resident and Facility."

A "Nursing Assessment" was performed on the day that Ms. Rayborn was admitted to Masters, and a copy of the assessment is included in the record before us. Ms. Rayborn's verbal responses were described as oriented, appropriate, and not confused. She was also described as alert and not lethargic, and her mental status was listed as "Not disoriented." Ms. Rayborn's hearing and vision were both given the highest rating, which was "Adequate." Ms. Rayborn was also given a "Mini-Mental State Exam," during which she was asked various questions and scored based on her responses. Ms. Rayborn scored a 24 out of a possible score of 27, only losing points when she was asked to spell a word backwards.

On October 19, 2003, five days after Ms. Rayborn was admitted to Masters, she was re-admitted to Cookeville Regional Medical Center. Three days later, she was discharged back to Masters, and her discharge summary reads as follows:

> DISCHARGE DIAGNOSIS:
>
> 1. Confusion secondary to medication effect plus anemia
> 2. Iron deficient anemia
> 3. Left upper lobe pneumonia
> 4. Diabetes mellitus

5. Right tibial fracture

. . .

HISTORY: Ms. Hazel Rayborn is a 67-year-old white female recently admitted with a right tibial fracture. She had been discharged to Master's Nursing Home for rehabilitation. It was noted that she became quite confused and was transported to the emergency department. She was evaluated and found to have a left upper lobe pneumonia. It was also noted that she was on several medications which could have been contributing to her confusion. She was also found to be anemic. . . . Her mental status revived quickly with cessation of several of her medications. . . .

At his deposition, Mr. Reagan was questioned by his attorney about Ms. Rayborn's confusion as follows:

Q. Okay. Now, your mom was on some medication when she came from the hospital to Masters there that first time, right?

A. During October 14th?

Q. Right.

A. Yes, she was on medication.

Q. Those medications subsequently caused her some problems with cognition and understanding; is that right?

. . .

A. Based on what I seen, I would assume that the medication had some altering effect.

Q. She had some confusion?

A. Uh-huh.

Q. At some point after, she had left Masters and she went back to the hospital four or five days later, right?

A. Yes.

Q. Do you recall when that confusion, in your view, started or was it there when she left the hospital?

A. Honestly, I felt like it was somewhat there when she left the hospital, not as bad as a couple of days later. It seemed like it just kept progressing more and more.

. . .

Q. So it was there when she got to Masters and it just got worse, in your view?

A. Yes. I know that after she was in there for about three or four days it got to the point that she was, in a way, hallucinogenic or something. She would see things that's not there.

Mr. Reagan stated at his deposition that he did not know whether Ms. Rayborn read any of the documents she signed. He also stated that because of Ms. Rayborn's limited eyesight, "it would be hard for her to see that or even read that, the agreement itself, without someone actually reading it to her." Mr. Reagan said that she would have been relying on what she was told.

Upon the completion of discovery, the plaintiff, Mr. Reagan, acting as Administrator of Ms. Rayborn's estate, filed a response to the defendants' motion to compel arbitration, contending that the ADR Agreement was unenforceable because: (i) Ms. Rayborn did not knowingly and voluntarily waive her rights; (ii) the arbitration agreement is unconscionable; (iii) the agreement is unenforceable by its terms because the entity that was designated to administer the agreement, ADR Associates, LLC, has merged with another entity and can no longer arbitrate the action; and (iv) the defendants breached their fiduciary duty to Ms. Rayborn by enticing her to waive her constitutional rights in order to receive medical care.

The trial court did not hold an evidentiary hearing. The court simply entered an order denying the defendants' motion to compel arbitration, which stated, in part: "The Court has considered the Motion, responses, and the record as a whole, and finds that the Motion is not well-taken and should be DENIED." Unfortunately, the trial court did not specify why it found the ADR Agreement unenforceable and did not include any findings of fact or conclusions of law in its order. The defendants filed a timely notice of appeal to this Court.[7]

[7] Tennessee Code Annotated section 29-5-319 provides that an appeal may be taken from an order denying an application to compel arbitration, although no final judgment has been entered, "in the manner and to the same extent (continued...)

II. ISSUES PRESENTED

The defendants present the following issues for review, which we slightly restate:

1. Whether the circuit court, making no findings regarding Ms. Rayborn's mental competency to execute the ADR Agreement, erred in denying Appellants' motion to compel arbitration.
2. Whether the circuit court erred by announcing that *Owens v. National Health Corporation*, 2006 Tenn. App. LEXIS 448 (June 30, 2006), compelled a grant of Appellants' motion to compel arbitration, yet nonetheless denying the Motion.[8]

Additionally, Appellee presents the following issues for review, we which also restate:

3. Whether Tennessee law applies to the interpretation and enforcement of this arbitration agreement.
4. Whether the trial court correctly determined that the arbitration agreement is unenforceable, because (i) the arbitration agreement was not the product of a knowing and voluntary waiver; (ii) the agreement, as presented to Ms. Rayborn, is unconscionable; (iii) the failure of an essential term, the designation of the arbitral forum, prevents the arbitration agreement from being enforced; and/or (iv) the defendants breached their fiduciary duty to Ms. Rayborn.

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[7](...continued)
as from orders or judgments in a civil action." Tenn. Code Ann. § 29-5-319 (2000).

[8] According to the appellants' reply brief, this statement was made by the judge during a conference call with the parties' attorneys. The judge apparently called the attorneys to inform them that he was summarily dismissing the motion to compel arbitration, and that a hearing on the motion was not necessary. There is no transcript of any hearing on the motion to compel arbitration in the record before us. Appellants' brief states that the trial court ruled without the benefit of an evidentiary hearing.

For the following reasons, we reverse the decision of the circuit court and remand for entry of an order compelling arbitration.

III. STANDARD OF REVIEW

On appeal, this Court reviews a grant or denial of a motion to compel arbitration under the same standards that apply to bench trials. ***Hubert v. Turnberry Homes, LLC***, No. M2005-00955-COA-R3-CV, 2006 WL 2843449, at *2 (Tenn. Ct. App. Oct. 4, 2006) (citing *Spann v. Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698, 706-707 (Tenn. Ct. App. 2006)). When the trial judge has failed to make specific findings of fact, we will review the record to determine where the preponderance of the evidence lies, without employing a presumption of correctness. ***Ganzevoort v. Russell***, 949 S.W.2d 293, 296 (Tenn. 1997); ***Hardcastle v. Harris***, 170 S.W.3d 67, 78-79 (Tenn. Ct. App. 2004). In other words, we must weigh the evidence to determine in which party's favor the weight of the aggregated evidence falls. ***Parks Properties v. Maury County***, 70 S.W.3d 735, 741 (Tenn. Ct. App. 2001) (citing *Coles v. Wrecker*, 2 Tenn. Cas. (Shannon) 341, 342 (1877); *Hohenberg Bros. Co. v. Missouri Pac. R.R.*, 586 S.W.2d 117, 119 (Tenn. Ct. App. 1979)). "There is a 'reasonable probability' that a proposition is true when there is more evidence in its favor than there is against it." ***Id.*** (citing *Chapman v. McAdams*, 69 Tenn. 500, 506 (1878); 2 McCormick on Evidence § 339, at 439 (John W. Strong ed., 4th Practitioner's ed. 1992)). The prevailing party is the one in whose favor the evidentiary scale tips, no matter how slightly. ***Id.*** (citations omitted). We review a trial court's resolution of legal issues without a presumption of correctness and reach our own independent conclusions regarding these issues. ***Id.*** (citing *Johnson v. Johnson*, 37 S.W.3d 892,

894 (Tenn. 2001); *Patterson v. Tennessee Dept. of Labor & Workforce Dev.*, 60 S.W.3d 60, 62 (Tenn. 2001); *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 367 (Tenn. 1998); *Hicks v. Cox*, 978 S.W.2d 544, 547 (Tenn. Ct. App. 1998)).

IV. DISCUSSION

First of all, we must address Mr. Reagan's issue regarding whether Tennessee law applies to the interpretation and enforcement of the arbitration agreement. The question of whether the contract is governed by the state or federal arbitration act must be resolved in order to determine whether certain issues concerning the arbitration agreement will be decided by an arbitrator or by a court. ***Owens v. Nat'l Health Corp.***, — S.W.3d —, 2007 WL 3284669, at *5 (Tenn. Nov. 8, 2007). Tennessee law contemplates judicial resolution of contract formation issues. ***Frizzell Constr. Co., Inc. v. Gatlinburg, L.L.C.***, 9 S.W.3d 79, 85 (Tenn. 1999). If the Tennessee act applies, contract formation questions will be decided by the court, not by an arbitrator. ***Owens***, 2007 WL 3284669, at *5.

Parties to an arbitration agreement may choose the terms under which they will arbitrate, and a contract may provide that it will be governed by a particular state's arbitration act. ***Owens***, 2007 WL 3284669, at *4. In this case, there appears to be no dispute between the parties that Tennessee

law applies. The ADR Agreement expressly provides that the provisions of the Tennessee Uniform Arbitration Act, Tenn. Code Ann. § 29-5-301 *et seq*., shall govern the arbitration. Accordingly, we will look to Tennessee law to determine whether the arbitration agreement is enforceable.

Arbitration agreements in contracts are favored in Tennessee both by statute and existing case law. ***Benton v. Vanderbilt University***, 137 S.W.3d 614, 617 (Tenn. 2004). The Tennessee Legislature, by enacting the Uniform Arbitration Act, embraced a legislative policy favoring enforcement of agreements to arbitrate.[9] ***Buraczynski v. Eyring***, 919 S.W.2d 314, 317 (Tenn. 1996). Under the Tennessee act, "a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract . . . ." Tenn. Code Ann. § 29-5-302(a) (2000). "Accordingly, under the terms of the statute, arbitration agreements generally are enforceable unless grounds for their revocation exist in equity or in contract law." ***Buraczynski***, 919 S.W.2d at 318. In determining whether there is a valid agreement to arbitrate, courts should apply ordinary state-law principles that govern formation of contracts. ***Taylor v. Butler***, 142 S.W.3d 277, 284 (Tenn. 2004).

A. Impossibility of Performance

[9] In ***Buraczynski***, the Supreme Court acknowledged the opinion held by some scholars that public policy favors alternative dispute resolution because it is quicker, less expensive, and relieves court congestion. 919 S.W.2d at 318 (citing Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 Va. L. Rev. 947, 949 (1972)). "[T]he same advantages to arbitration have been cited in the health provider-patient context, namely speed, lack of expense, finality of decisions and informality of procedure and rules, and some argue that arbitration actually favors the injured patient." ***Id.*** at 318, n.3.

Mr. Reagan contends that the ADR Agreement is unenforceable because a material term of the agreement is incapable of performance. Mr. Reagan refers to the following provisions of the ADR Agreement:

> A. Any and all claims or controversies arising out of or in any way relating to this ADR Agreement ("Agreement") or the Resident's stay at the Facility . . . shall be submitted to alternative dispute resolution as described in the Dispute Resolution Process for Consumer Healthcare Disputes, Rules of Procedure ("the Dispute Resolution Process") which are incorporated herein by reference.
>
> . . .
>
> D. Any mediation or arbitration conducted pursuant to this Agreement shall be administered by, and according to the rules and procedures of an independent impartial entity that is regularly engaged in providing mediation and arbitration services. The Demand shall be made in writing and may be submitted to ADR Associates, LLC, 1666 Connecticut Avenue, NW, Suite 500, Washington, D.C. 20009 (the "Administrator"), by regular mail, certified mail, or overnight delivery. If the parties choose not to select ADR Associates, LLC or if ADR Associates, LLC is unwilling or unable to serve as the Administrator, the parties shall select another independent and impartial entity that is regularly engaged in

> providing mediation and arbitration services to serve as Administrator.

Mr. Reagan contends that "ADR Associates, LLC has merged into and become a part of JAMS," so that ADR Associates, LLC, is "no longer an entity available to administer the ADR Agreement." Mr. Reagan acknowledges the ADR Agreement's provision stating that the parties will select another entity if the named entity is unable to serve as the Administrator, but he claims that this is merely a "contract to make a contract" giving rise to no legal obligation. He also claims that the parties' choice of this particular arbitrator and its procedures was a term so material to the contract that failure of this term voids the agreement.

This same issue was recently addressed by our Supreme Court in ***Owens***, 2007 WL 3284669. In that case, the plaintiff contended that the two arbitration organizations named in the arbitration agreement at issue were unavailable to conduct the arbitration, and therefore, the agreement was unenforceable. ***Id.*** at *7. The plaintiff further argued, as in this case, that the specification of those two arbitrators was such a material term of the contract that the contract itself must fail if neither of the named organizations would conduct the arbitration. ***Id.*** The Supreme Court rejected these arguments, recognizing that Tennessee Code Annotated section 29-5-304 "provides for the very contingency illustrated by the facts of this case." ***Id.*** at *8. The statute provides:

> If the arbitration agreement provided a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or

> if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and a successor has not been duly appointed, the court on application of a party shall appoint one (1) or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

Tenn. Code Ann. § 29-5-304 (2000). The Court found no factual basis for the plaintiff's assertion that the specification of those two organizations was so material to the contract that it must fail if they were unavailable. ***Owens***, 2007 WL 3284669, at *8.

Likewise, in the case at bar, there is simply no evidence to support Mr. Reagan's contention that the entire ADR Agreement must fail if ADR Associates, LLC, is unavailable to serve as the Administrator. In fact, the ADR Agreement expressly recognized that ADR Associates, LLC, might become unwilling or unable to serve as the Administrator, and it provided that the parties would select "another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator." Even assuming that the agreed-upon arbitrator is unavailable,[10] and that the parties are unable or simply unwilling to agree on another, as the ADR Agreement provided, the court may appoint one or more arbitrators to conduct the arbitration

[10] The record contains no information about ADR Associates, LLC, to indicate whether or not it is actually unable to administer the ADR Agreement. Mr. Reagan simply contends that the entity has merged and become unavailable for arbitration. The defendants' reply brief also states that ADR Associates, LLC, has merged with another entity.

pursuant to Tennessee Code Annotated section 29-5-304. The terms of the ADR Agreement are not unenforceable or impossible to perform.

B. Breach of Fiduciary Duty

Next, we will address Mr. Reagan's argument that the defendants had a fiduciary and confidential relationship with Ms. Rayborn that "created an affirmative duty on [the defendants] to place Ms. Rayborn's interests above its own and to refrain from enticing her to waive her constitutional rights" by signing the ADR Agreement. In support of his fiduciary duty argument, Mr. Reagan refers to the trust and confidence needed between a patient and his or her physician, and he cites cases from various jurisdictions recognizing a fiduciary relationship between long-term facilities and residents.

This issue was also addressed by our Supreme Court in ***Owens***, 2007 WL 3284669, at *12, where the plaintiff argued that the defendants breached fiduciary duties they owed to the patient in obtaining her signature on the arbitration agreement. The Court explained that such a breach-of-fiduciary-duty theory is based upon the implied premise that a nursing home owes a resident a fiduciary duty *prior to* the time he or she signs the contract for admission to a nursing home. ***Id.***

> Assuming solely for the purpose of argument that a fiduciary duty *might* arise following a patient's admission to a nursing home, the plaintiff has cited no authority for the finding that a fiduciary duty

> is owed to a *potential* patient of a nursing home. The record discloses no facts supporting a fiduciary relationship, contractual or otherwise, between [the patient] and the nursing home prior to the time [the patient], through [the power of attorney], signed the nursing-home contract. We therefore agree with the intermediate appellate court that the arbitration agreement is not unenforceable on the breach-of-fiduciary-duty ground asserted by the plaintiff. Given our holding that this issue is without merit, any discovery allowed by the trial court on remand should not include discovery on the breach-of-fiduciary-duty issue.

Id.

We note that in ***Owens***, the nursing home contract itself contained the arbitration provision. Here, the arbitration agreement was a separate, stand-alone document. Still, the ADR Agreement was presented along with the admissions contract, in the same stack of documents, during the same presentation and process of admitting Ms. Rayborn to Masters. Even assuming *arguendo* that a fiduciary duty might have arisen once Ms. Rayborn was admitted to Masters, we find that no such relationship existed during the admissions process. Thus, the ADR Agreement is not unenforceable on the ground that Masters breached a purported fiduciary duty owed to Ms. Rayborn by presenting it for her acceptance.

C. Unconscionability

Next, Mr. Reagan contends that the arbitration agreement was a contract of adhesion, and that the circumstances surrounding the signing of the arbitration agreement render it procedurally unconscionable.

The question of whether a contract or a provision thereof is unconscionable is a question of law. ***Taylor v. Butler***, 142 S.W.3d 277, 284-85 (Tenn. 2004). "Unconscionability may arise from a lack of a meaningful choice on the part of one party (procedural unconscionability) or from contract terms that are unreasonably harsh (substantive unconscionability)." ***Trinity Industries, Inc. v. McKinnon Bridge Co., Inc.***, 77 S.W.3d 159, 170 (Tenn. Ct. App. 2001) (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)). In Tennessee, we have tended to lump the two together and speak of unconscionability resulting "when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on one hand, and no honest and fair person would accept them on the other." ***Id.*** (quoting *Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984)). The determination of whether a contract or term is or is not unconscionable is to be made in light of its setting, purpose and effect. ***Taylor***, 142 S.W.3d at 285 (citing Restatement (Second) of Contract § 208, cmt. a (1981)). Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes. ***Id.***

A "contract of adhesion" has been defined as "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the

consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." ***Buraczynski v. Eyring***, 919 S.W.2d 314, 320 (Tenn. 1996) (quoting Black's Law Dictionary 40 (6th ed. 1990)). Even a contract of adhesion, though, is not automatically unenforceable. The enforceability of contracts of adhesion generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable. ***Taylor***, 142 S.W.3d at 285. Contracts of adhesion must be closely scrutinized to determine if unconscionable or oppressive terms are imposed which prevent enforcement of the agreement. ***Buraczynski***, 919 S.W.2d at 316. In determining whether a contract is unconscionable and unenforceable, courts must consider all the facts and circumstances of the case. ***Owens***, 2007 WL 3284669, at *11.

In ***Buraczynski v. Eyring***, 919 S.W.2d 314, 316 (Tenn. 1996), the Supreme Court considered the enforceability of arbitration agreements between physicians and patients. The Court first determined that "arbitration agreements between physicians and patients are not per se void as against public policy." ***Id.*** at 319. The arbitration agreements executed by the patients were found to be contracts of adhesion because the patients had to sign the agreements in order to continue receiving medical care. ***Id.*** at 320. However, that fact was not determinative of the arbitration agreement's enforceability. The Court explained various considerations relevant to its analysis:

> [I]n general, courts are reluctant to enforce arbitration agreements between patients and health care providers when the agreements are

> hidden within other types of contracts and do not afford the patients an opportunity to question the terms or purpose of the agreement. This is so particularly when the agreements require the patient to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment, and when the agreements give the health care provider an unequal advantage in the arbitration process itself.

Id. at 321. When applying these principles to the case before it, the Court concluded that the arbitration agreements were not unconscionable or unenforceable. The arbitration agreements were not hidden within a clinic or hospital admission contract, but were separate, one-page documents each entitled "Physician-Patient Arbitration Agreement." ***Id.*** Also, a short explanation was attached to the document which encouraged the patient to discuss questions about the agreement with the physician. ***Id.*** Neither party was given an unfair advantage in the arbitration process, and both parties were bound by the arbitrator's decision. ***Id.*** Furthermore, the patient was "clearly informed by a provision in ten-point capital letter red type, directly above the signature line, that 'by signing this contract you are giving up your right to a jury or court trial' on any medical malpractice claim." ***Id.*** There were no buried terms, as all terms were laid out clearly in the agreement. ***Id.*** Also, the agreement could be revoked for any reason within thirty days. ***Id.*** "Finally, and perhaps most importantly, the agreements did not change the doctor's duty to use reasonable care in treating patients, nor limit liability for breach of that duty, but merely shifted the disputes to a different

forum." ***Id.*** The Court therefore determined that the arbitration agreements, though contracts of adhesion, were enforceable. ***Id.***

The Eastern Section of this Court applied the ***Buraczynski*** factors to arbitration agreements included in nursing home contracts in ***Howell v. NHC Healthcare-Fort Sanders, Inc.***, 109 S.W.3d 731 (Tenn. Ct. App. 2003), and in ***Raiteri v. NHC Healthcare/Knoxville, Inc.***, No. E2003-00068-COA-R9-CV, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003), and held that the arbitration agreements in those cases were unconscionable. Both agreements were contracts of adhesion, offered on a take-it-or-leave-it basis, as the patients had to sign the agreements in order to be admitted to the nursing homes. ***Raiteri***, 2003 WL 23094413, at *8; ***Howell***, 109 S.W.3d at 735. Also, the arbitration provisions were part of a larger contract dealing with many issues, rather than being set forth in a separate, stand-alone document. ***Raiteri***, 2003 WL 23094413, at *8; ***Howell***, 109 S.W.3d at 734. The provisions waiving the patients' right to a jury trial were buried and in no way highlighted or bolded, there was no explanation addressing how mediation and arbitration worked, and only the nursing home was responsible for choosing the arbitrator. ***Raiteri***, 2003 WL 23094413, at *8; ***Howell***, 109 S.W.3d at 734-35. Additionally, in ***Howell***, the patient was unable to read. The Court stated that "the fact that Howell cannot read does not excuse him from a contract he voluntarily signed." ***Id.*** at 735 (citing *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 359 (Tenn. Ct. App. 2001)). However, a nursing home employee did not ask him to read it, but took it upon herself to explain the document, and she failed to mention that he was waiving the right to a jury trial if he brought a claim against the nursing home. ***Id.*** Given all these circumstances, the Court held that the nursing home failed to demonstrate that the parties bargained over the arbitration

agreements' terms or that the provision was within the reasonable expectations of an ordinary person.[11] ***Id.***

In the case before us, Mr. Reagan claims that the circumstances surrounding Ms. Rayborn's execution of the ADR Agreement shock the conscience, rendering the agreement unconscionable under the circumstances. He points to the fact that Ms. Rayborn had a limited education and limited vision, and that she had authorized her son to execute the admissions documents for her. Mr. Reagan accuses the defendants of cornering and ambushing Ms. Rayborn in order to secure her signature. He also claims that the defendants refused to provide him with a copy of the agreement, effectively precluding the exercise of Ms. Rayborn's right to revoke the agreement.

Although there are some factors in this case that weigh in favor of a finding of procedural unconscionability, we believe they are outweighed by the factors that do not support such a finding. Mr. Reagan did testify that Ms. Rayborn had only completed the eighth grade and some homeschooling, and he did not think she had a high school diploma. He also testified that she could not see well,[12] and he did not know whether or not she was able to read the admissions documents

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[11] Mr. Reagan cites ***Howell*** for his argument that "[a]ny defendant seeking enforcement of an arbitration provision must prove that the parties 'actually bargained over the arbitration provision or that it was a reasonable term under the circumstances.'" However, according to ***Diagnostic Center v. Steven B. Stubblefield, M.D., P.C.***, 215 S.W.3d 843, 847 (Tenn. Ct. App. 2006), such proof has only been required in cases dealing with contracts of adhesion. The Court explained that under the Tennessee Uniform Arbitration Act, a "written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract." ***Id.*** (quoting Tenn. Code Ann. § 29-5-302).

[12] The only evidence to suggest that Ms. Rayborn had poor eyesight is Mr. Reagan's testimony. The "Nursing Assessment" performed when Ms. Rayborn was admitted to Masters described her vision as "Adequate," the highest rating available, for both the right and left eyes.

that she signed. However, Mr. Reagan acknowledged Ms. Rayborn's ability to understand the documents if they were explained to her. Mr. Reagan testified that when the first insurance documents were presented in Ms. Rayborn's room,"the situation was explained to me what each paperwork was about, as well as with my mother." Mr. Reagan explained that it would be hard for his mother to read documents "without someone actually reading it to her." Mr. Reagan said that he generally explained some of the documents to her, but not in depth. Mr. Reagan did not voice any concerns he had about his mother's ability to sign documents to any Masters employees, and he apparently expected her to sign the documents herself during these initial discussions with Masters employees.

Mr. Reagan also claims that the agreement is unconscionable and unenforceable because Ms. Rayborn gave him authority or permission to execute all of the admissions documents. It is not clear from the record whether any Masters employees knew that Ms. Rayborn gave such permission to Mr. Reagan. The Masters employees who were deposed were not asked about Mr. Reagan's authority to sign for Ms. Rayborn. Mr. Reagan testified that Masters' employees heard Ms. Rayborn tell him to sign for her when they were in her room at Masters. Mrs. Reagan, however, testified that Ms. Rayborn had told him to sign the papers when they were still at the hospital. According to Mrs. Reagan, Mr. Reagan simply asked Ms. Rayborn "if she wanted him to sign the papers or if she wanted to, and she told him to go ahead and sign them." Even assuming that Ms. Rayborn did give Mr. Reagan permission to sign, and Masters employees heard her, we see no reason why Ms. Rayborn would have thereby deprived herself of authority to also sign documents. As previously discussed, Mr. Reagan never told anyone at Masters that he was acting as Ms. Rayborn's legal

representative. Furthermore, when Ms. Gibbons was explaining the admissions paperwork, Ms. Rayborn never told her about her son. Mr. Reagan admits that he had no legal authority to prevent Ms. Rayborn from signing the arbitration agreement. Ms. Rayborn had never been diagnosed or adjudicated mentally incompetent, and no one had been appointed as her conservator or executed a power of attorney. Indeed, in most of the recent Tennessee cases involving the enforceability of arbitration agreements in nursing home contracts, someone other than the resident has signed an arbitration agreement, and the plaintiff argued that the third person was not authorized to sign the agreement or waive the resident's rights. *See, e.g.*, ***Owens v. Nat'l Health Corp.***, — S.W.3d —, 2007 WL 3284669, at *5-7 (Tenn. Nov. 8, 2007) (considering an arbitration agreement signed by an attorney-in-fact pursuant to power of attorney); ***Raines v. Nat'l Health Corp.***, No. M2006-1280-COA-R3-CV, slip op. at 2, (Tenn. Ct. App. Dec. 6, 2007) (same); ***Necessary v. Life Care Centers of America, Inc.***, No. E2006-00453-COA-R3-CV, 2007 WL 3446636, at *2-3 (Tenn. Ct. App. Nov. 16, 2007) (considering an agreement signed by the resident's husband who had her oral permission to sign); ***Cabany v. Mayfield Rehab. & Special Care Ctr.***, No. M2006-00594-COA-R3-CV, 2007 WL 3445550, at *1 (Tenn. Ct. App. Nov. 15, 2007) (considering an agreement signed by a spouse who had executed a power of attorney for healthcare); ***Raiteri v. NHC Healthcare/Knoxville, Inc.***, No. E2003-00068-COA-R9-CV, 2003 WL 23094413, at *9 (Tenn. Ct. App. Dec. 30, 2003) (considering an agreement signed by the resident's husband); ***Howell v. NHC Healthcare-Fort Sanders, Inc.***, 109 S.W.3d 731, 733 (Tenn. Ct. App. 2003) (same). Here, the resident, Ms. Rayborn, signed the ADR Agreement herself, and it was proper for her to do so. In short, even if Mr. Reagan had oral express authority from Ms. Rayborn to sign documents on her behalf, we see no reason why Ms. Rayborn thereby became unable to contract.

The ADR Agreement was not a contract of adhesion. Ms. Rayborn could have been admitted to Masters even if she refused to sign it. The signature page clearly provides that execution of the Agreement is "not a precondition to the furnishing of services to the Resident by the Facility." Assuming that Ms. Rayborn did not read the ADR Agreement, Ms. Gibbons explained to her that it was voluntary for her to sign. Ms. Rayborn was not forced to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment. As in ***Buraczynski***, 919 S.W.2d at 316, the Agreement was not contained within an admission contract or hidden among terms unrelated to arbitration, but was a separate, stand-alone document entitled "**ALTERNATIVE DISPUTE RESOLUTION AGREEMENT BETWEEN RESIDENT AND FACILITY**." The Agreement provided on the last page that the resident had the right to seek legal counsel, and Ms. Gibbons also told Ms. Rayborn that her family could look over the Agreement if she wished. The Agreement explains the details of mediation and arbitration. Mr. Reagan does not contend that the procedures set forth in the Agreement give any unfair advantage to the defendants, and we see no unfair advantage in the Agreement. The first page of the Agreement states, in bold print, "**Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s).**" Again, assuming that Ms. Rayborn did not read the Agreement, Ms. Gibbons told Ms. Rayborn that by signing the document, a dispute regarding her care at Masters would be settled through mediation and arbitration instead of a jury trial. The Agreement provides, and Ms. Gibbons explained, that a resident may revoke the Agreement within thirty days. However, Mr. Reagan claims that he asked a nurse for a copy of all the admissions paperwork several times, although it is not clear when, and he claims that he did not receive copies in a timely manner. Ms. Gibbons stated

that it was Masters' policy to provide copies to the residents upon completion of the admissions paperwork, but she did not remember personally making copies of the ADR Agreement that Ms. Rayborn signed. Finally, as noted in ***Buraczynski***, 919 S.W.2d at 316, the ADR Agreement did not change the defendants' duty to use reasonable care in treating Ms. Rayborn, nor limit liability for breach of that duty, but merely shifted disputes to a different forum.

There is nothing in the record to suggest that Ms. Rayborn was coerced into signing the ADR Agreement, or that she was denied an opportunity for a meaningful choice. There is similarly nothing to indicate that Ms. Rayborn felt uncomfortable signing the admissions documents as Ms. Gibbons explained them to her. Ms. Rayborn simply mentioned to her son that she had signed more admissions documents after he left, that he had not signed, without further elaboration. Mr. Reagan stated that he was not upset when he learned that Ms. Rayborn had signed the admissions documents, implicitly recognizing her authority to do so. The ADR Agreement is not a contract of adhesion, and Mr. Reagan does not contend that the substantive terms of the agreement are unreasonably harsh. Again, there are facts in this case to support both parties' arguments regarding procedural unconscionability; however, we disagree with Mr. Reagan's assertion that the defendants' conduct shocks the conscience. Considering all the facts and circumstances of this case, we conclude that the ADR Agreement is not unconscionable, oppressive, or unenforceable.

D. Ms. Rayborn's Knowledge and Waiver of Rights

Finally, Mr. Reagan contends that Ms. Rayborn did not knowingly and voluntarily waive her right of access to the courts and a jury trial by signing the arbitration agreement. Mr. Reagan first argues that in the nursing home context, one cannot comprehend the significance of an arbitration agreement when admitting a family member because the facility makes assurances that the resident will be taken care of, and the resident cannot foresee the mistreatment or abuse that may occur. In ***Owens***, 2007 WL 3284669, at *10, the plaintiff similarly argued that several of the ***Buraczynski*** factors regarding unconscionability are implicated in every nursing home contract containing an arbitration clause, and asked the Court to hold that arbitration agreements in nursing home contracts violate public policy. The Supreme Court refused to read a public policy "exception" into the Tennessee Uniform Arbitration Act and held that pre-dispute arbitration agreements in nursing home contracts do not violate public policy and are not *per se* invalid. ***Id.*** To the extent that Mr. Reagan suggests that it is impossible to knowingly and freely agree to arbitrate disputes "in the nursing home context," we find his argument to be without merit.

Mr. Reagan also claims that Ms. Rayborn's execution of the ADR Agreement was not knowing and voluntary because of her limited education, her medications, and Ms. Gibbons' inability to testify as to Ms. Rayborn's mental state. The defendants argue that Mr. Reagan is unable to establish that Ms. Rayborn was incompetent to engage in the transaction at issue.

The degree of mental capacity required to enter into a contract is a question of law. ***Rawlings v. John Hancock Mut. Life Ins. Co.***, 78 S.W.3d 291, 297 (Tenn. Ct. App. 2001). All adults are

presumed to be competent enough to enter into contracts, ***id.***, and an individual is presumed to have capacity to make a health care decision.[13] Tenn. Code. Ann. § 68-11-1812(b) (2006).

> Because of the importance of autonomy, it is well-settled that the law presumes that adult persons are sane, rather than insane, and capable, rather than incapable, to direct their personal affairs until satisfactory evidence to the contrary is presented. Mental or physical impairment should never be presumed. The force of these presumptions does not wane as a person ages.

In re Conservatorship of Groves, 109 S.W.3d 317, 329-30 (Tenn. Ct. App. 2003) (footnotes and citations omitted). The party attempting to invalidate a contract based on the theory of mental incapacity bears the burden of proving that one or both of the contracting parties were mentally incompetent when the contract was formed. ***Rawlings***, 78 S.W.3d at 297 (citing *Knight v. Lancaster*, 988 S.W.2d 172, 177-78 (Tenn. Ct. App. 1998); *Williamson v. Upchurch*, 768 S.W.2d 265, 269 (Tenn. Ct. App. 1988)).

> Persons will be excused from their contractual obligations on the ground of incompetency only when (1) they are unable to understand

[13] There are a variety of tools available allowing individuals to exercise control over their lives and property by making decisions prior to the time when their capacity becomes impaired. *See* ***Cabany v. Mayfield Rehab. & Special Care Ctr.***, No. M2006-00594-COA-R3-CV, 2007 WL 3445550, at *5 (Tenn. Ct. App. Nov. 15, 2007) (referring to statutes authorizing durable powers of attorney, living wills, advanced directives, and durable powers of attorney for healthcare).

> in a reasonable manner the nature and consequences of the transaction or (2) when they are unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of their condition.

Id. (citing Restatement (Second) of Contracts § 15(1) (1981)). It is not enough to prove that a person was depressed or had senile dementia; rather, to prove mental incapacity, the person with the burden of proof must establish, in light of all the surrounding facts and circumstances, that the cognitive impairment or disease rendered the contracting party incompetent to engage in the transaction at issue according to the standards set forth above. ***Id.*** (footnotes and citations omitted).

As proof of Ms. Rayborn's alleged inability to agree to arbitrate disputes, Mr. Reagan first refers to Ms. Gibbons' deposition testimony regarding the execution of the agreement. Ms. Gibbons testified that she spent a couple of hours with Ms. Rayborn going over the entire admissions process and explaining the paperwork and pamphlets. Ms. Gibbons was asked if she recalled whether Ms. Rayborn was "physically or mentally able to transact business" when she was admitted, and Ms. Gibbons said she did not know. She testified that she could not describe Ms. Rayborn's state of mind at the time that she executed the arbitration agreement, and when asked whether Ms. Rayborn was confused at all, Ms. Gibbons stated that she didn't know. Ms. Gibbons then said that Ms. Rayborn was not having any problems with confusion. Ms. Gibbons said that Ms. Rayborn did not ask her any questions about the ADR Agreement or the other documents, she simply signed them without saying anything. The next day, Ms. Gibbons mentioned to her son that she had signed

documents "to finish up her admission," but she did not go into detail about what exactly she signed. Ms. Rayborn simply told him that they were admissions documents that Mr. Reagan did not sign, that she needed to sign.

Mr. Reagan further submits that the medication Ms. Rayborn was taking at the time of her admission prevents any finding that she knowingly entered into the agreement to arbitrate. Mr. Reagan claims that Oxycodone/Percocet is "commonly acknowledged to affect a person's mental alertness." However, Dr. Miller opined, to a reasonable degree of medical certainty, that Ms. Rayborn's prescribed dose of Oxycodone "does not impair an individual's cognitive ability to the point of preventing them from reading or understanding documents." Dr. Miller further opined, to a reasonable degree of medical certainty, that "Hazel Rayborn was not cognitively impaired on October 14, 2003, to prevent her knowing and voluntary execution of the Alternative Dispute Resolution Agreement Between Resident and Facility."

Mr. Reagan also points to the fact that Ms. Rayborn was re-admitted to the hospital five days after her admission to Masters due to confusion. According to the hospital discharge summary, "[i]t was noted that she became quite confused and was transported to the emergency department." Ms. Rayborn was found to have pneumonia and anemia, and "[i]t was also noted that she was on *several medications* which could have been contributing to her confusion." (emphasis added). Ms. Rayborn's mental status revived quickly "with cessation of several of her medications." It is not clear from the record whether Ms. Rayborn was prescribed additional medications after her admission to Masters besides the Oxycodone. Nonetheless, the fact that Ms. Rayborn became

confused five days after being admitted to Masters does not demonstrate that she was incompetent on October 14, 2003, when she was admitted. Ms. Bilbrey testified that Ms. Rayborn seemed oriented, that she knew who she was and where she was, and she recalled being a former employee of Masters.[14] According to the Nursing Assessment performed when Ms. Rayborn was admitted, her verbal responses were oriented, appropriate, and not confused. She was also described as alert and not lethargic, and her mental status was listed as "Not disoriented." Ms. Rayborn only missed one question on the mental state exam that she was given. Mr. Reagan testified that he "felt like [the confusion] was somewhat there when she left the hospital, not as bad as a couple of days later. It seemed like it just kept progressing more and more." However, Ms. Rayborn made the decision herself to enter Masters for treatment, as Mr. Reagan explained:

> A. When her physician had suggested for her to be put into a nursing home for rehab, I was the first to disagree with that move, but my mother felt like it might be in her best interest.
>
> . . .
>
> Q. What caused your mom, if you know, to seek admission to Masters following her stay at Cookeville Regional? . . . Why did your mom elect to go to Masters instead of back home, if you know?
>
> A. Based on Dr. Austin's recommendation of having rehab.

[14] Ms. Rayborn had worked in the laundry department at Masters during the early 1990's.

Q. Do you know whether your mother could have elected to receive home physical therapy as opposed to being admitted to Masters?

A. She looked at the different options that she had and she felt like it would be much less of a burden, as she would call it, on myself and my wife to provide care for her. So she elected to take the recommendation of her physician.

Q. Just so we're clear, your mother made her own decision to go to Masters upon the advice of Dr. Austin; is that correct?

A. Yes.

Obviously, Mr. Reagan and Ms. Rayborn felt that she was capable of making this important decision on her own, against the advice of her son, on the day that she was discharged from the hospital. By Mr. Reagan's own account, Ms. Rayborn was able to weigh her options and determine which course of action she felt would be in her best interest, also taking into account the consequences that other options would have on her family. That same afternoon, Ms. Gibbons explained to Ms. Rayborn that by choosing to execute the ADR Agreement, any disputes about the care she received at Masters would be settled through mediation and arbitration rather than by a jury trial. Ms. Rayborn signed the agreement, and Mr. Reagan now says, "I do not think that she was fully capable of making, you know, a real good choice. . . . I don't know if she was fully mentally competent." However, Mr. Reagan never told anyone at Masters of concerns about her competency.

From our careful review of the record, considering all the facts and circumstances of this case, we find Mr. Reagan has failed to demonstrate that Ms. Rayborn was unable to understand, in a reasonable manner, the nature and consequences of executing the ADR Agreement or unable to act in a reasonable manner in relation to the transaction. Keeping in mind that adults are presumed competent to enter contracts and make health care decisions, we do not find sufficient evidence indicating that Ms. Rayborn was incapable of agreeing to arbitrate disputes, thereby waiving her right to a jury trial.

V. CONCLUSION

Finding no grounds for revocation of the arbitration agreement in equity or in contract law, we reverse the decision of the circuit court and remand for the entry of an order compelling arbitration. Costs of this appeal are taxed to the appellee, Ira Lynn Reagan, as Administrator of the Estate of Hazel Rayborn, for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J., W.S.